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No. 84-1193

In the Supreme Court of the United States

October Term, 1984

STATE OF MISSOURI,
Petitioner,
v.
ROBERT J. SETTLE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF FOR ROBERT J. SETTLE IN OPPOSITION

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QUESTION PRESENTED

Whether the action of the police officer in this case violated the Fourth Amendment's prohibition against unreasonable searches and seizures when the police officer detained Respondent outside the police officer's jurisdiction without reasonable suspicion or probable cause, with the result that evidence obtained by reason of the police officer's action should be suppressed.

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OPINION BELOW

The opinion of the Court of Appeals is reported at *Settle v. State*, 679 S.W.2d 310 (Mo.App. W.D. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1984. The State's Motion for Rehearing or Transfer to the Missouri Supreme Court was overruled by the Court of Appeals on October 2, 1984. The Missouri Supreme Court denied the State's application to transfer to that court on November 20, 1984. The Petition for Writ of Certiorari was filed with this Court on January 18, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent was found guilty on July 8, 1982 after a jury trial in the Circuit Court of Clay County, Missouri of unlawful possession of hydromorphone in violation of Section 195.020, R.S.Mo. (1978) and on September 30, 1982 was sentenced by the Honorable John R. Hutcherson, Associate Circuit Judge, to a term of ten years imprisonment. (Tr. 396, 422). On appeal, the Missouri Court of Appeals, Western District, reversed Respondent's conviction and ordered him discharged from custody on the grounds of an unlawful detention of Respondent.

The facts are fully set forth in the Opinion of the Court of Appeals. (The trial court made no findings of fact.) The Court of Appeals found the following facts in the Court's opinion (Pet.App. 2-7) and same are set forth below.

On May 22, 1981, Sgt. Joseph McHale of the Kansas City, Missouri Police Department, wearing a uniform and carrying a gun, drove alone in an unmarked police car having no emergency lights, sirens or markings identifying it as a Kansas City police car other than a spotlight on the driver's side.

At about 2:00 a.m., McHale patroled through a Quik Trip parking lot, a convenience store that remained open at that hour, on Highway 169 at Englewood Road in Clay County, Missouri. He spotted a vehicle with Missouri license plates occupied by two women who appeared to be in their twenties. Another car, with Wyandotte County, Kansas plates, also drove into the lot. From the vantage point of a bank parking lot, McHale saw the two women leave their car and walk over to talk to the driver of the second car, defendant Settle, who appeared to be in

his forties. The age difference between the two women and Settle, as well as the second car's out-of-state license plate, caught the officer's attention.

McHale watched as the two women walked over to Settle's car and then "promptly turned back around, got in their car, and proceeded to leave" without going into the store. McHale stated there could have been laughter exchanged. McHale also did not think at this time that Settle appeared intoxicated. In actuality, Settle had driven out to visit the women, one of whom had known Settle through her husband for approximately two years. The two women had agreed to meet Settle at the Quik Trip after Settle phoned to say he could not find one of the women's apartment.

The two women proceeded to go to their destination (the North Star Apartments) in their car. Settle followed, and McHale followed behind both of the two cars. After leaving the corporate limits of Kansas City and after having entered into the City of Gladstone, Missouri, McHale observed Settle's car "(leave) the roadway on the shoulder going off the road" at one point on the 5700 block of North Broadway. He stated Settle's rear wheel went onto the road's shoulder. He considered this "to be an indication that (the defendant) possibly was driving under the influence" and notified his Kansas City dispatcher to request assistance from the Gladstone police. He did not state what facts, if any, were related to the dispatcher. Officer Coup of the Gladstone Police Department testified he had been dispatched "to back a Kansas City police officer on a car check, traffic violation. . . ." McHale stated that the lack of any emergency equipment on his car prevented him from stopping Settle's car on Broadway.

McHale continued following the two cars into the North Star Apartments. McHale stated that the defendant had

not committed any misdemeanor or felony, but believed a traffic violation in Gladstone had occurred. He had also checked Settle's license plate for "wants or warrants" before stopping. He stated he wished to talk to the defendant because he "felt him running off the road would give (him) probable cause to question him as to his sobriety . . . during that time of the morning". The defendant stopped his car on his own, with McHale following shortly afterwards. When McHale saw Settle outside of his car, McHale pulled up to defendant's car, showed a light in his face, and asked for identification. Some interval of time transpired between McHale's arrival and the arrival of two Gladstone officers, Coup and Toman. McHale took identification from the two women and defendant, running a computer check on them, and allowing the women to leave before the arrival of the Gladstone officers. McHale walked up to the defendant and received identification from all three persons. He had told the two women "to come back to him". One of the women did not have identification and McHale refused to allow her to obtain identification from her apartment and instead asked for and received her name and birth date. Defendant did not leave because McHale was a policeman and had a gun. McHale told Settle he was being arrested for drunk driving. When Defendant protested, McHale told him to "shut up and I'll ask the questions". The women were allowed to leave after they were checked out in the computer. After they left, McHale asked defendant whether they were prostitutes.

McHale testified Officer Coup arrived in "just a matter of minutes . . . in . . . a minute, maybe two minutes afterwards. That's an estimation." Officer Toman arrived in a separate car after Officer Coup. At McHale's direction, Officer Coup stood watching Settle while McHale

continued checking Settle's identification, although problems with the computer had arisen. As to the facts related by McHale to the Gladstone officers regarding his reasons for stopping Settle, McHale stated, "I believe I told (the Gladstone officers) that (the defendant) had gone off the road" in Gladstone. Neither McHale nor Coup related any observations of the defendant supporting McHale's suspicion that Settle had been drinking alcohol or was intoxicated.

Officer Coup continued to watch Settle, who stood carrying a can of pop in one hand. Coup then saw Settle reach into his pocket with his other hand and pull out some object he could not identify. Settle then threw the can of pop, along with the unidentified object, into a grassy area. Coup asked the other two officers to watch Settle while he retrieved whatever had just been thrown by the defendant. Coup looked and less than a foot away from the can of pop, found a prescription vial containing small yellow tablets and small plastic bags containing a white powdery substance. Trial testimony identified two of the yellow tablets as hydromorphone.

The defendant was then placed under arrest, frisked, and his car opened and searched. A search of the car produced a handgun lying on the floorboard of the car, a brown sack containing additional white plastic bags of white powdery substances, some syringes, and some black pills. The plastic bags appeared similar to those found in the prescription vial. A search of the defendant's person produced another plastic bag holding a white powdery substance. Except for the gun, which was not allowed into evidence, all of the seized items were entered into evidence over the defendant's objections. Only the small yellow tablets in the prescription vial thrown by Settle were found to be controlled substances. The con-

tents of the vial formed the basis of the charge for which Settle was convicted. At trial, the powdery substance was identified as "kiddie dope", a non-controlled substance.

At the Gladstone Police Headquarters, Officer Coup administered a breathalyzer test to the defendant after completing paperwork. The test came out as .01, well below the level considered as legally intoxicated. The officers issued a citation for careless and imprudent driving. Trial testimony indicated the citation was dismissed.

The appellate court found that: ". . . Sgt. McHale did not have knowledge of the commission of any offense when he left the territorial jurisdiction of Kansas City. He left his jurisdiction armed with bare suspicions tied to age differences, an out-of-state license plate and behavior he considered 'strange' but lacking the necessary ingredient of probable cause. One isolated instance of the rear wheel leaving the road during the course of several blocks does not rise to the level of probable cause that the driver was intoxicated, especially when McHale's prior firsthand observations failed to support such a suspicion. Neither did any observations of the defendant at the North Star Apartments indicate he was intoxicated. McHale's actions contradict the motives claimed to underlie his actions, affirming the conclusion that his suspicions served merely as a pretext to proceed on a nocturnal fishing expedition outside of his jurisdiction. McHale also claimed to have legitimate concerns for the safety of the two women. His actions uncovered different concerns. He abandoned the opportunity at the Quik Trip to simply ask the women whether they were all right in favor of stalking the entire scenario. At the North Star Apartments, he demanded identification not only from the defendant but from the supposed potential victims, and asked whether they were prostitutes. Although his

car was equipped with a spotlight, he made no attempt to stop the car claimed to be operating dangerously. When the car stopped at the apartments, he demanded identification not only from the driver of the car believed to have committed the traffic offense, but also from the driver and passenger of the other car he followed. . . ." (Pet.App. A14-A15).

McHale's credibility was for the Court of Appeals to determine. At one point in the proceedings, McHale testified he saw *both* of the back wheels of Settle's car go off the road. (Tr. 79). His trial testimony was inconsistent with his other testimony. (LF 107-109). He also stated he kept Settle detained but let the two women leave so that the Gladstone Officer could arrest Defendant. (Tr. 82). Both Kansas City (Section 34.115) and Gladstone (Section 300.366) Ordinances provide that a person is guilty of careless driving only if he endangers the property or person of another. *State v. Todd,* 477 S.W.2d 725 (Mo.App. 1972). There were no such circumstances here. These ordinances are set out in the Appendix at A1.

ARGUMENT

1. Petitioner asks this Court to review the fact finding of the Missouri Court of Appeals, Western District. This Court should not grant certiorari to review any purported errors in fact finding by state courts. *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *United States v. Sharpe*, 469 U.S. ....., 36 C.R.L. 3197, 3206-3207 (Brennan, dissenting) (1985). Indeed, this Court customarily accepts the factual findings of state courts in the absence of exceptional cir-

cumstances. *California Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111-112 (1980).

2. The petition for certiorari should also be denied because of the failure by Petitioner to comply with this Court's rules. Thus, the petition for certiorari does not indicate the reasons to be considered in this Court's granting review on certiorari under Rule 17 of this Court's rules. Thus, it is not stated in the petition that the state court in this instance decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals, nor is it stated that the state court in this instance decided an important question of federal law which has not been, but should be, settled by this Court; nor finally is it stated that the state court in this instance decided a federal question in a way in conflict with applicable decisions of this Court.

3. This Court should deny review as to Questions 1 and 3 presented in the Petition for Certiorari because the issues presented as to these questions were not presented to the appellate court until oral argument and after oral argument. (See, Pet.App. A19; see Letter to Court of Appeals from Petitioner dated July 3, 1984, at App. A2-A4). Petitioner's Brief in the Court of Appeals failed to raise the issue of "abandonment"; the issue that the hydromorphone was seized by the Gladstone police as a result of a second, lawful stop by the Gladstone police was also not raised in Petitioner's Brief in the Court of Appeals—the argument was made in the brief *only* that this second stop justified the search of the passenger compartment of Settle's car. (State's Brief at 41-42). Petitioner did urge the appellate court that "stop" did not occur until after the Gladstone police arrived. (State's Brief at 37). Petitioner has abandoned this latter con-

tention in this Court. It is essential to the jurisdiction of this Court under 28 U.S.C. Section 1257 that a substantial federal question has been properly raised in the state court proceedings. See generally Stern and Gressman, "Supreme Court Practice", 5th Ed., at p. 208; compare, *Illinois v. Gates,* 103 S.Ct. 2317, 2321-2325 (1983).

4. Petitioner contends that in its first reason for this Court to grant the writ that there was no "causal connection" between the unlawful stop and the discovery of the drugs. The Court of Appeals' opinion, upon which defendant relies, found directly to the contrary. (Pet.App. A17-A19). The facts in the *Oliver, Colbert,* and *Berry* cases cited by Petitioner are factually dissimilar from the instant case. None of these cases involved a "pre-textual" stop or arrest as does the instant case. In any event, the *Oliver* opinion has been criticized by a leading authority and has not been followed in a subsequent case in Florida:

> "The *Oliver* reasoning is not convincing. The question is not whether, but for the throwing away of the objects, the police would have found them in an illegal search. Rather, the question is whether the prior illegality has prompted the disposal, which it most assuredly did. *Oliver* is an invitation to police to engage in illegal stops. The better view, therefore, is reflected in *Monanhan v. State,* 390 So.2d 756 (Fla.App. 1980) (Abandonment argument rejected, as abandonment came after illegal stop of defendant)." 1 *LaFave,* "Search and Seizure", Pocket Part at p. 146.

Unlike *Oliver,* the facts in this case show that the search began of defendant before any "abandonment" of any controlled substance. *State v. Berry* is also inapposite on its facts as there was an abandonment of a cigarette lighter in the snow during a chase by an officer. The court's holding

in *Berry* was *dicta;* the court in fact held that there was probable cause for a warrantless arrest. The Court of Appeals distinguished *Berry* and the Missouri Supreme Court declined review of the appellate court's opinion in this case. In any event, this Court should not grant certiorari to resolve a conflict between the Missouri Supreme Court and one of Missouri's appellate courts. *Compare, Davis v. United States,* 417 U.S. 333, 340 (1974) (Certiorari not granted to resolve intra circuit conflicts).

The law seems generally settled in support of Defendant's position on this issue. *United States v. Beck,* 602 F.2d 726 (5th Cir. 1979) cited by the Court of Appeals; *Commonwealth v. Jeffries,* 311 A.2d 914 (1973); *Commonwealth v. Harris,* 421 A.2d 199 (1980); *Commonwealth v. Barnett,* 398 A.2d 1019 (1979); *State v. Bennett,* 430 A.2d 424 (R.I. 1981). There is a discussion of the cases in *LaFave, Id.,* at pp. 366-375. There is no reason to grant the writ for this reason under Rule 17 as no true conflict with existing case authority appears.

5. In Question 2, the Petitioner argues that there was, in fact, reasonable grounds for a stop of Settle. Petitioner then urges the somewhat novel position that although a right to stop may have been granted to a police officer under this Court's decision in *Terry v. Ohio,* 392 U.S. 1 (1968), it should also be extended to an officer who did not have the power to act as a police officer because he had exceeded his jurisdiction.

Defendant believes that the question as posed is improperly stated. In the first instance, it appears that the Court of Appeals held that there was, in fact, an arrest as opposed to a "stopping" of defendant by Officer McHale. Thus, McHale would have had to have "probable cause" in order to effectuate the detention of defendant on the night

in question. The Court of Appeals held that McHale did not have such grounds, but was merely using the detention as a pretext to search for evidence. This is in violation of established precedent. *United States v. Lefkowitz,* 285 U.S. 452 (1932). Even if McHale's action was in a "stop", nothing can be seized as being in "plain view" if such objects were seen following a pre-textual *stop* for a minor offense. *United States v. Santana,* 485 F.2d 365, 367-68 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974). There is in fact a lengthy discussion in the Court of Appeals' opinion, upon which defendant relies, concerning whether or not there were grounds for a "citizen's arrest" but the Court of Appeals found that there were no such grounds under Missouri law or otherwise. Thus, it is clear that the Court of Appeals' opinion is not based solely upon the fact that the officer exceeded his jurisdiction but rather on the fact that there was neither reasonable suspicion, nor probable cause for the action (whether an arrest or a stop) that the officer took in this case.

Question 2 presents no ground for this Court's review under Rule 17.

6. With respect to Question 3 presented by Petitioner's petition, again, the state assumes that McHale had reasonable grounds based upon articulable suspicion to detain defendant. The Court of Appeals found otherwise.

The cases cited by the state in this regard are distinguishable from the instant case and do not present a conflict question by this Court. *United States v. Walker,* 535 F.2d 896 (5th Cir. 1976), cited by the state, is inapposite. The court appealed the seizure in that case because the only nexus between the first arrest and the second was the fact of defendant's arrest at the scene. The second arrest was based entirely upon another police of-

ficer's independent investigation of the facts, which was not the case here. It is also noted that *United States v. Walker* has been criticized as a "questionable result, for it would seem to encourage the seizure of suspects upon inadequate grounds while an investigation is conducted for the purpose of establishing probable cause". 3 *LaFave*, "Search and Seizure", at p. 643.

United States v. Pimental, 645 F.2d 85, 86 (5th Cir. 1981), also cited by the state, is also inapposite because in that case in the interim period after an arrest, the police developed from other sources reasonable suspicion that the car was involved in criminal activity.

Question 3 presents no ground for this Court's review under Rule 17.

In *Whitely v. Warden*, 401 U.S. 560 (1971), the court held that if the instigating officer in arrest did not possess sufficient evidence to constitute reasonable grounds to make an arrest, the arrest was invalid.*

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*This case does not present the issues present either in this Court's decision in *United States v. Sharpe*, 469 U.S. ....., 36 C.R.L. 3197 (1985), holding that a 20-minute *Terry* stop was not a *per se* violation of the Fourth Amendment, where the officers, unlike the instant case, met *Terry* standards, or in the court's opinion in *United States v. Hensley*, 469 U.S. ....., 105 S.Ct. 675 (1985). In *Hensley*, the court held that a "wanted" flyer issued upon facts giving rise to a reasonable suspicion under *Terry* gave other officers a right to stop defendant. Here there were no such facts giving rise to a reasonable suspicion conveyed by McHale to the Gladstone officers. As was said by this Court in *Hensley*: "If the flyer has been issued in the absence of a reasonable suspicion, then a stop in objective reliance upon it violates the Fourth Amendment." 105 S.Ct. at 683.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April, 1985

APPENDIX

Kansas City Ordinance 34.115 reads as follows:

> "No person shall drive any vehicle within this city carelessly and heedlessly in disregard of the rights or safety of others; or without due caution and circumspection; or at a speed and in a manner so as to endanger or to be likely to endanger any person or property."

Gladstone Ordinance 300.366 reads as follows:

> *"Section 300.366. Careless driving.*
>
> "Any person who drives any vehicle upon a street carelessly and heedlessly, in disregard of the rights or safety of others, or without due caution and circumspection, or at a speed and in a manner so as to endanger or to be likely to endanger any person or property shall be guilty of careless driving and shall be in violation of this ordinance."

(State Seal)

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July 3, 1984

Ms. Peggy J. Stevens, Clerk
Missouri Court of Appeals,
Western District
1300 Oak Street
Kansas City, MO 64106

Re: State v. Robert J. Settle, No. WD 34,189

(Cir.Ct. No. CR181-207F)

Dear Ms. Stevens:

The above-styled case has been fully briefed and was orally argued on Monday, June 25, 1984, before Division III (Judges Lowenstein, Manford and Berrey). During oral argument, counsel for the respondent referred to several cases and authorities that were not listed in the briefs filed by the parties in this action. These cases and authorities all deal with the appellant's final argument, and therefore should be added to the citations listed under Point III of the State's brief.

Two of the cases have been cited in support of the State's argument that the appellant abandoned the con-

trolled substance by discarding it in a field, thereby rendering the legality of the alleged arrest or "stop" irrelevant:

State v. Oliver, 368 So.2d 1331 (Fla.App. 1979);

State v. Berry, 609 S.W.2d 948, 952[6-7] n. 3 (Mo. banc 1981).

The remaining cases have been cited in support of the appellant's argument that even if the Kansas City police did, in fact, arrest or unlawfully "stop" the appellant, the discovery of the contraband was the result or "fruit" of a second, lawful stop by the Gladstone police that was not tainted by the alleged prior illegal stop:

United States v. Pimental, 645 F.2d 85, 86-87[1] (1st Cir. 1981);

United States v. Walker, 535 F.2d 986, 898-899[1-2] (5th Cir. 1976);

State v. Jacobson, 398 So.2d 857, 858-859[1-2] (Fla.App. 1981);

State v. Phillips, 140 Vt. 210, 436 A.2d 746, 750-751[13-14] (1981).

Finally, in support of the State's argument concerning the validity of the alleged "stop" as a citizen's arrest, the respondent wishes to add the following authority that had not been published at the time the State's brief was prepared:

Scurlock, *Basic Principles of Arrest, Searches and Seizures, Privilege Against Self-Incrimination,* 51 U.M.K.C. L.Rev., Vol. 51, Nos. 3-4, p. 418 (Spring-Summer 1983).

At page 418 of that article, Professor Scurlock notes that "[i]n Missouri, a private person apparently may arrest for any misdemeanor commited in his presence".

Fifteen copies of this letter have been enclosed with the original, so that one might be attached to, or inserted in the copies of the State's brief previously filed with this Court. As always, we appreciate your consideration and cooperation in this matter.

Very truly yours,

JOHN ASHCROFT
Attorney General
/s/ Philip M. Koppe
PHILIP M. KOPPE
Assistant Attorney General

PMK:pk
Encl.
cc: Mr. James R. Wyrsch